Supreme Court, U. S.
FILED
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MICHAEL RODAK JR., CLERK

In The

Supreme Court of the United States

October Term, 1977.

No. **76-1519**

In the Matter of
ALFRED O. KUHNLE,

Appellant,

against

JOHN T. O'HAGAN, as Commissioner of the Fire Department of the City of New York and BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND-ARTICLE 1.

Appellee.

Jurisdictional Statement Pursuant to S.C. Rule 13(2)

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G OPINION N.Y.APP.DIV. 17

The appellant, Alfred O. Kuhnle, by his attorney William D. Friedman, makes this jurisdictional statement required by paragraph 2 of Rule 13 of the United States Supreme Court.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is not yet reported and is set forth in Appendix A. The opinion of the Appellate Division, First Department, State of New York, is reported at 55 A.D.2d 536, 389 N.Y.S.2d 788 (1976). The opinion of the Supreme Court of the State of New York, County of New York is not reported and is set forth in Appendix B. An opinion of a companion case, *Kuhnle v. New York State Division of Human Rights*, is reported at 40 N.Y.2d 720, 389 N.Y.S2d 824 (1976).

JURISDICTIONAL GROUNDS

The nature of the proceeding is the applicability of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to a public employee pension system which suspends the pension, upon re-employment in public service, of a pensioner receiving a pension because of physical disability but not those on pension because of other disabilities or for service.

The date of the order sought to be reviewed and the date of its entry is February 15, 1977 and the court in which it was filed is the Court of Appeals of the State of New York.

The statutory provision believed to confer on this court jurisdiction of the appeal is 28 U.S.C. 1257(2).

The case believed to sustain jurisdiction is *Geduldig v. Aiello*, 417 U.S. 484 (1974).

The statutes involved in the appeal are:

Article 7 of the Retirement and Social Security Law of the State of New York, Book 50 1/2 page 327, McKinney's Consolidated Laws of New York Annotated, (Appendix C), Section 1117 of the New York City Charter, Vol. 1, page 276, New York City Charter and Administrative Code Annotated, 1976 Ed., (Appendix D), Article 1, New York Fire Department Fund, Vol. 2A, page 439, New York City Charter and Administrative Code Annotated, 1976 Ed. (Appendix E).

QUESTIONS PRESENTED

I. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was violated by New York State statutes which grant the right to public employee retirees, except those on physical disability retirement, to be reemployed in public service and continue to receive full retirement benefits.

II. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was violated by New York State statutes which give new benefits to individuals already retired, except those on physical disability retirement, with regard to the right to be reemployed in public service and continue to receive full retirement benefits.

STATEMENT OF CASE

Appellant was appointed to the Fire Department of the City of New York on December 14, 1937. On that date he became a member of the Article 1-The New York City Fire Department Pension Fund. Petitioner retired on July 9, 1959 on a disability pension as the result of a physical disability caused in the performance of his duty as a fireman. On March 1, 1969, appellant became a teacher for the Board of Education of the City of New York. On August 20, 1970, appellant's pension was suspended retroactive to March 1, 1969 and for as long as he was so employed.

At the time appellant retired, section 1117 of the New York City Charter, Appendix D, prohibited him from being reemployed in public service and continuing to receive his pension. This restriction applied to all Article 1 retirees. Appellant had sufficient service time to either elect a retirement for service or for disability. He chose the latter because of the greater benefits. To qualify for the disability pension, appellant did not have to be unable to perform any job but only unable to be a fireman for physical reasons. Section B19-4.0(a) of the Administrative Code of City of New York, Appendix E.

After his retirement and election of the disability pension, the New York State law was changed to allow retirees, other than those on physical disability retirement, to be reemployed in public service and receive their full retirement benefits. Article 7 of the Retirement and Social Security Law of the State of New York, Appendix C. The only reason appellant did not qualify under Article 7 was that he was on physical disability retirement.

The statutory scheme sets up three classifications of Article 1 retirees. These are 1) retirement for service, 2) retirement for mental disability, and 3) retirement for physical disability. The benefits for both disability retirees are identical except for reemployment in public service rights. The qualifications for both disability retirees is identical as shown in the statute which reads that "The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his duties." Section B19-4.0(a) of Administrative Code of City of New York, Appendix E. There was no requirement that the appellant prove that he was physically unable to perform any employment in order to qualify for such a disability pension and no such finding was made. He was just physically unfit to be a fireman.

The stage in the proceedings that the federal constitutional issue was first raised was in the petition in the court of first instance, New York State Supreme Court. Paragraph 12 of the petition reads as follows: "The provisions of sections 210 to 215 of the New York State Retirement and Social Security Law [appendix C] deny the petitioner equal protection of the law as guaranteed by the United States and New York State Constitutions in that non-disability pensions are paid to retirees in like circumstances whereas disability pensions are not." It was clear from the pleadings and the reference to the statutes that "disability" meant the physically disabled and "non-disabled" meant all others. The court held there was no denial of equal protection and stated that: "There are significant differences between disabled retirees and service retirees in the amount of their respective allowances and other benefits received. The differentiation

between the two classes of retirees bears a reasonable and just relation to a legitimate state purpose." Opinion of the Court, Appendix B. In his appeal to the Appellate Division, First Department, State of New York, appellant raised only one point which read as follows:

> "It is a denial of equal protection of law of both the United States and New York State Constitutions to deny the petitioner his accidental disability pension because of his employment whereas persons receiving other than a disability pension are getting their full pension when so employed."

The court affirmed for the reasons stated in the lower court. *Kuhnle v. O'Hagan*, 55 AD2d 536, 389 NYS2d 788 (1976). In his appeal to the Court of Appeals of the State of New York, appellant raised only one issue in his notice of appeal which stated that "this appeal relies solely upon the validity of Sections 210 to 215 of the New York State Retirement and Social Security Law under the equal protection clauses of the New York State Constitution and the United States Constitution insofar as applicable to petitioner's disability pension for physical disability ...." The Clerk of the Court of Appeals wrote the appellant's attorney a letter which stated that: "The Court may examine its subject matter jurisdiction *sua sponte* in view of the *stare decisis* effect of this Court's determination in *Alfred O. Kuhnle v. N.Y.S. Division of Human Rights* [40N.Y.2d 720, 389 NY52d 824 (1976)] decided November 30, 1976, and further in view of the fact that Special Term's consideration of sections 212, 213, 214 and 215 do not appear to raise a demonstrable and substantial constitutional question with respect to this appellant." The Court of Appeals dismissed the appeal upon the

ground that no substantial constitutional question is directly involved. Appendix A.

REASONS FOR GRANTING THE APPEAL

This Court has recently reviewed several cases concerning the application of the Equal Protection Clause to social insurance; e.g. *Califano v. Goldfarb*. No. 75-699 (1977). In these cases the Court has not ruled on the classification of the physically disabled in relation to other groups.

The facts in the instant case are undisputed. At issue is the validity of a public employee retirement system which creates three classes of retirees — 1) physically disabled, 2) mentally disabled, and 3) service. Only the retiree on physical disability pension cannot be reemployed in public service and continue to receive his pension. Section 210(a) of the Retirement and Social Security Law of New York State, Appendix C. To treat the physically disabled differently than others without some reasonable basis is in violation of the Equal Protection Clause. *Geduldig v. Aiello, supra* at 497; *General Electric Co. v. Gilbert*, 97 Sup. Ct. 401, 407 (1976). If the retiree had to qualify for his physical disability pension by showing he was one hundred percent unable to perform any work, then such a reasonable basis would exist. Appellant merely had to show he was unable to perform his duties as a fireman to get his disability retirement. Section B19-4.0(a) of the Administrative Code of City of New York, Appendix E. If the physically and mentally disabled were treated the same then maybe there would be a reasonable basis for the system but in the instant case they are treated differently only as to this reemployment benefit.

The appellant, by electing to take physical disability retirement, is worse off economically than had he taken a service retirement for which he also qualified. By being reemployed in public service he got no pension whereas had he elected to retire on service he would have received a pension. Article 7 of the Retirement and Social Security Law of New York State, Appendix C. There can be no reasonable basis to discourage the physically disabled adult from rehabilitating himself. To create this economic hardship is such a discouragement.

If this Court would review this case and find for the appellant it would do much for the physically disabled adult, who has been ignored by the courts. The law should not discourage, by unreasonable economic penalties, the physically disabled from rehabilitating themselves.

CONCLUSION

The questions presented in this case are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

William D. Friedman
Attorney for Appellant

APPENDIX A

At a session of the Court, held at Court of
Appeals Hall in the City of Albany
on the fifteenth day
of February A.D. 1977

PRESENT, HON. CHARLES D. BRIETEL,
Chief Judge presiding.

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1 Mo. No. 144 SSD 17
In the Matter of

Alfred O. Kuhnle,

Appellant,

vs.

John T. O'Hagan, as Commissioner of the Fire Department of the City of New York, et al.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

APPENDIX B

MEMO
DECISION

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

Index No.
10779/75

---X

In the Matter of ALFRED O. KUHNLE,

Petitioner,

-against-

JOHN T. O'HAGAN, as Commr. of the Fire Department of the City of New York and BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND-ARTICLE 1,

Respondents.

---X

SAYPOL, J.:

Application by the petitioner in this proceeding (CPLR Art. 78) for judgment requiring the respondents to make payments under his disability pension, suspended since March 1, 1969, is denied.

Petitioner is a retired New York City fireman. He received a line of duty injury and retired in 1959 on an accidental disability pension. On March 1, 1969, petitioner became a regular teacher in the employ of the New York City Board of Education and on August 20, 1970 his pension was suspended retroactive to March 1, 1969 pursuant to the provisions of the New York City Charter, Section 1117, which requires suspension and forfeiture of pension benefits when retirees obtain post-retirement public employment.

The petitioner argues that the provisions of sections 210 to 215 of the New York State Retirement and Social Security Law deny him equal protection of the law as guaranteed by the United States and New York State Constitutions in that nondisability pensions are paid to retirees in like circumstances whereas disability pensions are not.

Under these sections of the Retirement and Social Security Law, a retired employee whose retirement was based upon service rather than disability, in certain inapplicable situations here, may engage in other public employment without diminution of retirement benefits during the period of such other employment.

There are significant differences between disabled retirees and service retirees in the amount of their respective allowances and other benefits received. The differentiation between the two classes of retirees bears a reasonable and just relation to a legitimate state purpose (*Meyer v. Meyer*, 271 App. Div. 465, 472, aff'd. 296 N.Y. 979; *Thorne v. Fire Department*, New York

County Clerk's Index No. 12008/73 [July 8, 1974 per Callahan, J.], aff'd. 46 AD2d 848, appeal dismissed 36 NY2d 700).

The petitioner has failed to substantiate his assertion that the respondents permit other disability retirees to obtain other public employment without affecting their retirement allowance. The petitioner makes such an allegation in paragraph 10 of the petition "upon information and belief." In paragraph 18 of the Verified Answer, the respondents say they make no exceptions to the statutory language which limits exemptions to those persons who have been retired for other than physical disability.

The petition is dismissed.

Settle judgment.

Dated: January 23, 1976.

(J.A.S.)
J.S.C.

BEST COPY AVAILABLE

APPENDIX C
RETIREMENT AND SOCIAL SECURITY LAW OF NEW YORK
ARTICLE 7 — RE-EMPLOYMENT IN PUBLIC SERVICE OF RETIRED PUBLIC EMPLOYEES

§210. Definitions

As used in this article:

a. The term "retired person" means a retired member of a retirement system or pension plan administered by the state or any of its political subdivisions who is receiving a retirement allowance for other than physical disability.

e. The term "public service" means the service of the state or any political division thereof, including a special district, district corporation, school district, board of cooperative educational services or county vocational education and extension board, or the service of a public benefit corporation or public authority created by or pursuant to laws of the state of New York, or the service of any agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the state or any of its political subdivisions.

§211. Employment of retired persons without diminution of retirement allowance

1. Notwithstanding the provisions of section one hundred one, two hundred twelve and four hundred one of this chapter or section five hundred three of the education law, or the provisions of any local law or charter, a retired person may be employed and earn compensation in a position or positions in the public service, without any effect on his status as retired and without suspension or diminution of his retirement allowance....

APPENDIX D

NEW YORK CITY CHARTER

§1117. Pensioner not to hold office.—If a person receiving a pension or a retirement allowance made up of such pension and an annuity purchased by the pensioner from the city or any agency, or out of any fund under the city or any agency, by reason of his own prior employment by the city or any agency, shall hold and receive any compensation from any office, employment or position under the state or city or any of the counties included within the city or any municipal corporation or political subdivision of the state, except the offices of inspector of election, poll clerk or ballot clerk under the election law or commissioner of deeds or notary public or jury duty, the payment of said pension only shall be suspended and forfeited during and for the time he shall hold and receive compensation from such office, position or employment; but this section shall not apply where the pension and the salary or compensation of the office, employment or position amount in the aggregate to less than one thousand eight hundred dollars annually.

APPENDIX E

NEW YORK CITY ADMINISTRATIVE CODE

TITLE B
FIRE DEPARTMENT PENSION FUND AND RELATED FUNDS
ARTICLE 1
NEW YORK FIRE DEPARTMENT PENSION FUND

§B19-4.0 Payment of pensions; disability; retirement for service.—a. The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his duties. Such member so retired shall receive from such pension fund an annual allowance or pension as provided in this section....

APPENDIX F

Index No.
10779/75

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

———————————————————X

In the Matter of ALFRED O. KUHNLE,

Petitioner,

-against-

JOHN T. O'HAGAN, as Commissioner of the Fire Department of the City of New York and BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND-ARTICLE 1,

Respondents.

———————————————————X

SIR:

PLEASE TAKE NOTICE that the above named petitioner hereby appeals to the Supreme Court of the United States from an order of the Court of Appeals of the State of New York entered in the office of the clerk of said court on February 15, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Dated: Hempstead, New York
April 7, 1977

Yours, etc.
William D. Friedman
Attorney for Petitioner
507 Fulton Avenue
Hempstead, New York 11550
(516) 538-5462

(Served April 7, 1977. Filed in Office of Clerk of New York County, New York 4-11-77).

APPENDIX G

DECISION OF NEW YORK APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 14, 1976.

Present—Hon. Arthur Markewich, Justice Presiding
Francis T. Murphy, Jr.
Vincent A. Lupiano
Louis J. Capozzoli
Emilio Nunez, Justices.

In the Matter of Alfred O. Kuhnle,
Petitioner-Appellant,

-against-

John T. O'Hagan, as Commissioner of the Fire Department of the City of New York and Board of Trustees of the New York City Fire Department Pension Fund-Article 1,
Respondents-Respondents.

3676

An appeal having been taken to this Court by the petitioner-appellant

from the judgment of the Supreme Court, New York County

(Saypol, J.), entered on March 11, 1976, denying petitioner's application and dismissing the petition,

and said appeal having been argued by Mr. William D. Friedman

of counsel for the appellant, and by Mr. Leonard Koerner

of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the judgment

so appealed from be and the same is hereby affirmed for the reasons stated by Saypol, J., at Special Term, without costs and without disbursements.

ENTER:

JOSEPH J [illegible]
Deputy Clerk.

Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITES STATES
October Term, 1977
Docket No. 76-1519

In the Matter of ALFRED O. KUHNLE,

Appellant,

-against-

JOHN T. O'HAGAN, as Commissioner of the Fire Department of the City of New York and BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENION FUND-ARTICLE 1.

Appellee.

---x

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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SUPREME COURT OF THE UNITED STATES
October Term, 1977
Docket No. 76-1519

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In the Matter of ALFRED O. KUHNLE,

Appellant,

-against-

JOHN T. O'HAGAN, as Commissioner of the Fire Department of the City of New York and BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND-ARTICLE 1.

Appellee.

----------x

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of this Court, the appellee moves to dismiss the appeal herein on the ground that it does not present a substantial federal question.

Question Presented

Are Sections 210 and 211 of the Retirement and Social Security Law, which permit only persons who have retired for reasons other than physical disability to hold a position in the public service without forfeiture of their pernsion allowances, unconstitutional?

Facts

On December 14, 1937, petitioner was appointed a fireman with the New York City Fire Department. He served in this position until July 9, 1959, when he was granted accident disability retirement.

On March 1, 1969, petitioner obtained employment with the Board of Education of the City of New York. On August 20, 1970, he was notified that in accordance with the provisions of the New York City Charter §1117 and Sections 210 and 211 of the Retirement and Social Security Law,*

*The charter and statute provide that a former City employee on pension may return to work for the state or local government provided, however, the pensioner had not retired because of disability.

his accident disability pension was suspended retroactive to March 1, 1969.

Effective September 1, 1974, the Executive Law was amended to bar discrimination in employment because of a physical disability. By letter dated September 19, 1974, petitioner's counsel wrote to the Fire Department for reinstatement of his pension as of September 1, 1974.

When the pension was not reinstated, petitioner filed a complaint with the New York State Division of Human Rights. The Division dismissed the complaint for lack of jurisdiction. In its Determination and Order after Investigation the State Division stated as its reasons for determining that it was without jurisdiction the following:

> "The alleged act of discrimination occurred on August 20, 1970 [the date appellant was notified of the suspension of his disability pension]. Under Section 286.10 [of the Executive Law] a complaint must be filed with the Division within one year after the occurrence of the alleged unlawful discriminatory practice.
>
> Also, the question of the complainant's disability predated September 1, 1974 at which time the Division had no jurisdiction.

The dismissal was affirmed by both the Human Rights Appeal Board and the Appellate Division, First Department, with one dissent in each case. On November 30, 1976, the Court of Appeals affirmed the order of the Appellate Division. 40 NY 2d 720.

Opinions Below

The Supreme Court, New York County (SAYPOL, J.), in a decision filed January 23, 1976, denied the application by the petitioner for judgment requiring the respondents to make payments under petitioner's

disability pension.

The Court found the statute constitutional as applied to the petitioner, holding that the "differentiation between the two classes of retirees bears a reasonable and just relation to a legitimate purpose" (citing cases) (Appendix B to Jurisdictional Statement at p. 9).

The judgment of the Supreme Court was affirmed by the Appellate Division of the New York Supreme Court on the opinion of the Supreme Court. 55 AD 2d 536 (1976). An appeal to the Court of Appeals was dismissed for want of a substantial constitutional question. 41 NY 2d 900 (1977).

ARGUMENT

THE FEDERAL CONSTITUTIONAL ISSUE RAISED ON THE APPEAL IS INSUBSTANTIAL. THERE IS NO DENIAL OF EQUAL PROTECTION OF THE LAW HERE. THE DISTINCTION MADE BY THE RETIREMENT AND SOCIAL SECURITY LAW BETWEEN PENSIONERS RETIRED FOR DISABILITY AND PENSIONERS RETIRED FOR SERVICE IS A REASONABLE ONE.

(1)

In 1964 the New York State Legislature enacted Sections 210 and 211 of the Retirement and Social Security Law. Subject to certain specified conditions, these sections permit service pensioners to accept public employment without loss of pension, but deny disability pensioners this benefit. The New York Courts properly held that the differentiation between the two classes of retirees bears a reasonable and just relation to a legitimate state purpose.

The appellant has focused his attack upon the fact that only a pensioner who has

retired for service may avail himself of the benefits conferred by the act. The New York State legislature chose not to permit a pensioner who was retired for disability to do so. The legislative classification, by itself, does not violate the equal protection clause.

> "It has been observed that there is hardly a law in the books that does not affect some people diffenently from others (see San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 60 [concurring opn.]). Under traditional analysis, the equal protection clause does not deny to states the power to treat different classes of persons indifferent ways, but a classification must be reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (Reed v. Reed, 404 US 71, 75-76; Neale v. Hayduk, 35 NY 2d 182, 186). A State does not violate the guarantee merely because the classifications made by the laws are imperfect (Dandridge v. Williams, 397 471, 485), and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (McGowan v. Maryland, 366 U.S. 420, 426; Matter of Dorn "HH" v. Lawrence "II", 31 NY

> 2d 154, 158)." Matter of Malpica-Orsini 36 NY 2d 568, 571, 331 N.E. 2d 486, 490 (1975).

The distinction drawn by the legislature between service pensioners and disability pensioners is a reasonable one. Service pensioners may retire because they have worked for a period of time sufficient to entitle them to their pension. Disability pensioners are entitled to their pensions because they were too ill to continue to work. The State may not wish to permit the disability pensioner to return to the public employ while continuing to hold a pension to which he is entitled on the premise that he is too ill to work. Moreover, the State, which wishes to encourage the pensioner who is physically fit to return to the public employ (see Sec. 211(2)(b)(2)), may not wish to encourage the disabled pensioner to do so.

By enacting Sec. 211, New York State assured itself of the availability of capable experienced personnel who might otherwise have been discouraged from returning to the public service because of the loss of their pension benefits. The entire scheme of the act indicates that it was designed to permit a pensioner who was in good health (Sec. 211(2)(b)(1)) and who possessed otherwise unavailable skills (Sec. 211(2)(b)(3)) to return to public employment and thereby supplement his income to the limit established by the statutory formula (Sec. 211(3)(a). As the New York Court of Appeals noted in the first appeal, Kuhnle v. Div. of Human Rights, 40 NY 2d 720, 722-723, 358 N.E. 2d 507, 509 (1976), the appellant, as a recipient of a disability pension received more than equal treatment. The pension he received

when he became disabled was one designed to meet his needs. It is a pension granted to the disabled despite their generally shorter periods of service anad smaller contributions to the pension fund. Depite the handicap, appellant was not barred from employment. In contrast, retirees on regular pensions have earned their benefits by longer years of service and greater contributions. Kuhnle, 40 NY 2d at p. 723, 358 N.E. 2d at p. 509. The Court of Appeals noted that the two pension programs and their respective conditions are not comparable. It concluded (40 NY 2d at p. 723, 358 N.E. 2d 509-510):

> "Each was designed to meet different needs; each contains conditions consistent with its own purpose. Therefore, it is neither irrational nor discriminatory for the State to limit the right to governmental employment while yet receiving a pension to those who are physically fit and to exclude those who are not to wit, those whose

retirement was based on disability. A program tailored to meet the unique needs of disabled employees is not to be deemed flawed merely because it is different from one designed for the nondisabled."

(2)

In support of his position, the appellant cites this Court's decisions in Geduldig v. Aiello, 417 U.S. 484 (1974), General Electric Co. v. Gilbert, 429 U.S. 125 (1976) and Califano v. Goldfarb, ____U.S.____, 97 S. Ct. 1021 (1977). Those cases are not contrary to our position. In each case, this Court applied the applicable rules where a statute is challenged on equal protection or statutory grounds. For example, in Califano, this Court held that a gender based distinction between widows and widowers in the social security survivor benefit's program violated due process and equal protection because there was no justi-

fication for the distinction. In the instant case, as we have shown above, the statutory classification of pensioners retired for disability and service pensioners is warranted because of the different purposes served by the two pension programs.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

August 19, 1977.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Appellee.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.